

UNITED STATES  
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Circuit Court of Appeals

For the Ninth Circuit

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THE NORMA MINING COMPANY, A  
CORPORATION,

*Appellant,*

vs.

HUGH MACKAY,

*Appellee.*

FILED  
MAY 11 1928  
U. S. DISTRICT COURT  
DENVER, COLO.

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BRIEF AND ARGUMENT OF APPELLEE.

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UNITED STATES  
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No. 3319

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This cause comes before this Court on appeal from an order of the United States District Court for the District of Arizona confirming a sale under a Decree of Foreclosure of two mortgages. The cause had previously been before this Court on appeal by the same appellant, and is Cause No. 2876. The appellant, feeling aggrieved by the Order confirming the sale, has prayed an appeal to this Court and assigned certain errors, which we will briefly discuss and endeavor to show that the Court com-

mitted no error against the appellant in entering said Order.

In regard to the first Assignment of Error, that sufficient notice of the time and place of sale was not given, it appears that the Notice of Re-Sale recites (Abstract of Record, page 38), that the property would be offered for sale "between the legal hours of sale on Wednesday, the 12th day of June, 1918, at the Court House door of Mohave County, in the Town of Kingman, Mohave County, Arizona." The place, therefore, seems to be well defined, the day likewise. The hour in the day is not specifically set except as being between the legal hours of sale on said day. In Arizona there is a statute providing that sales of real property on execution shall be made between the hours of 10 o'clock a. m. and 5 o'clock p. m.

"Where the statute fixed the hours of the day between which legal sales were to be held a Notice of an Execution Sale which advertised the sale to occur between the "lawful hours" of the day mentioned was held sufficient."

24 Cyc., 20.

"It is contended for the appellant that the recital in said deed that the real estate was advertised to be sold between the "lawful hours" of the day upon which it was to be sold renders it invalid. There is nothing in this contention. It was the duty of the sheriff to designate the day upon which the land would be sold in his advertisement. The law fixed the hours of that day between which it must be sold; and while it was not necessary that the hour should be stated in the advertisement, it was the duty of the sheriff to sell between those hours."

Evans vs. Robberson, 92 Mo., 192.

There is no showing at all that any person or prospective bidder was deceived by this method of designating the time of sale.

The second Assignment of Error is upon the ground that the Notice of Re-Sale did not describe the property to be sold with sufficient certainty. A reference to the Notice and a comparison of it with the mortgages being foreclosed best answers this Assignment. The description in the Notice is exactly the same as given in the second mortgage. Compare Abstract of Record, pages 38, 39, with Abstract of Record, pages 73, 74. It will, therefore, be seen that the same certainty was expressed in the Notice as had been used by the appellant in making its mortgage.

The Third Assignment of Error goes to the sufficiency of the consideration. It is a well-known rule of law that a judicial sale will not be set aside for inadequacy of price.

“The rule in reference to judicial sales is that in the absence of fraud and unfairness mere inadequacy of price, however gross, does not invalidate the sale.”

Wells vs. Lennox, 159 S. W., 1099, and cases therein cited.

“The sale will not be set aside for mere inadequacy of price unless it is so gross as to shock the conscience, but it will be if great inadequacy is accompanied by slight circumstances of unfairness in his (the bidder’s) conduct.”

Laton vs. Rhode Island Hospital Trust Co., Circuit Court of Appeals, 8th Circuit, 205 Fed. Reporter, 277, and cases therein cited.

The property was previously sold on the 18th day of May, 1916, and that sale set aside and an Order entered to re-sell. (Abstract of Record, page 34.) It appears

that the plaintiff was the purchaser at the first sale. The price paid was the amount of the judgment and costs. (Abstract of Record, page 32.) Two years later the property is again sold to the appellee for the then amount of the judgment and costs and interest. The record does not disclose, but the fact is that the property was the subject of two other judicial sales during this period, one for over Six Thousand Dollars (\$6,000) taxes, and the other for a subsequent labor lien. In each case the plaintiff therein was the purchaser at the amount of the judgment and costs. It would therefore appear that the price is all that could be obtained.

The appellant sought that the sale of May 18th, 1916, be set aside. (Abstract of Record, page 32.) In that application appellant took the position that conditions had changed so that the property should bring more. No irregularity in the sale was claimed or existed. The Court granted the prayer. In such case the ground set forth in the Fourth Assignment of Error should be considered with small favor:

“It does not lie in the mouth of one who by strenuous and protracted resistance has delayed a sale for years to claim still further delay on account of the depressed financial condition of the country.”

Am. & Eng. Enc., Vol. 17, page 973; *Pewabic Min. Co. vs. Mason*, 145 U. S., 349.

Notwithstanding the seventh Assignment of Error, the sale was not prematurely made under the order of resale or any rule of this Court or the District Court.

Respectfully submitted,

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